United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

ORIGINAL

74-1498

United States Court of Appeals

For the Second Circuit

JAMES V. McLEAN, ETHEL McLEAN, JOSEPH LINFANTE and SUSAN LINFANTE,
Plaintiffs-Appellees,

against

L. P. W. REALTY COMPANY, LAWRENCE PAUL WOLF,
Defendants,

GULF OIL CORPORATION,
Defendant-Appellant,

JOSEPH JAMES, Inc., and JOSEPH JAMES,
Defendants-Appellees-Appellants.

GULF OIL CORPORATION,
Third Party Plaintiff-Appellant-Appellee,

against

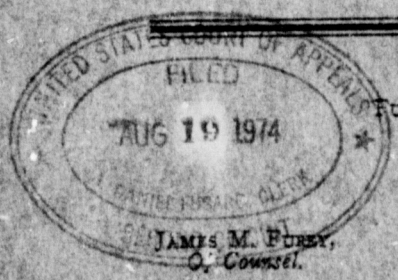
BEAMAN CORPORATION,
Third Party Defendant-Appellant,

and

UNITED PORCELAIN CO., Inc.,
Third Party Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of New York

BRIEF FOR THIRD PARTY PLAINTIFF-APPELLEE GULF OIL CORPORATION



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BRIEF FOR THIRD PARTY PLAINTIFF-APPELLEE GULF OIL CORPORATION

Issues

1. Was the contractual indemnity granted to Gulf and against Beaman proper?

2. Should Gulf have been granted indemnity from the defendant, James?

3. Was the jury verdict of apportionment against United Porcelain Co., Inc. in accordance with law and fact?

Since there is no question of financial responsibility, Gulf is not concerned with the other issues if the indemnity against Beamon is sustained.

Facts

The two male plaintiffs were employed by United Porcelain. They were in the process of erecting among other things, a decorative overhang on a gas station owned by L.P.W. Realty Company leased to Gulf and sub-leased to James. The overhang which they themselves installed collapsed causing them to fall.

The pre-trial Order set forth the plaintiffs' claim that "the area of the building in and about the coping and roof was not safe for the nature of the work to be performed" (66 A).

In support of this claim, the plaintiffs called Mr. Benjamin Leavin as an expert witness. He testified "somewheres there was a loose joint" and "it must have been a loose joint to have the wall move, Sir" (426 A, 427 A).

Mr. Leavin inspected the area during the first week in August, 1966, (418 A) which would be slightly over one month after the occurrence.

Mr. Leavin also testified that the owner of the building, which was L.P.W. Realty Company, had a duty to inspect (424 A).

With regard to the plan, Mr. Leavin testified that it is reasonable for Gulf to rely on an architect (445 A).

Mr. Leavin was questioned on the propriety of the presence of these two plaintiffs on the overhang:

> Q. "Would you agree if they put their weight on that overhang, it would be foolish and reckless on their part? A. It would be foolish." (459 A)

Mr. McLean testified at first, "we were partly on the overhang. Our knees were approximately half-way so that our weight is back here and just by leaning up forward, you pick up the light . . ." (405 A).

When Mr. McLean was recalled subsequent to the testimony of Mr. Leavin, he denied standing on the overhang (479 A) and he testified instead that he was kneeling on the coping (481 A).

McLean testified that it would be foolish to put his weight on the edge of the overhang and it would be "half foolish" to put his weight in the middle of the overhang. He was confronted with his deposition in which he admitted that he was kneeling, not on the roof, but on the overhang (536 A). The police officer, Leporati, testified that the two plaintiffs were working "on a cornice" and this apparently fell (143 A).

The only eye witness to the accident, Mr. James, testified that both men were completely on the overhang when the accident occurred (622 A).

Much time was spent on the question of inspections. The depositions of three Gulf employees, Beckett, Wiese

and Sadowsky were read into the record. The substance of their testimony was that Gulf checked on the operations of the gas station, but none of these gentlemen climbed up on the roof. This testimony was, of course, relevant only to the initial claim of the plaintiff that the wall was defective before the work started.

Under the theory which was litigated, the plans were equally collateral to the main issue. Mr. Spencer, an officer of Beamon, was shown the plans and stated, "yes, these are our plans" (647 A). The small pages were not identified as being by Beamon, but the large page is (648 A). This was the page containing the detailed plans which Judge Knapp believed to be improper. The process was described by Mr. Spencer as follows,

> "Q. Did Beamon Corporation get that large thing, Sir, large part of Exhibit B? A. Yes. We would have drawn this, yes Sir.
>
> Q. And would you send it to anybody after it was finished? A. Yes, we would send it to the customer and it would be given in this case to Mr. Saul Caso, his firm.
>
> Q. Well, Saul Caso, what firm is that? A. United Porcelain, I think he was operating under.
>
> Q. Who was the customer? A. Gulf Oil Company (648 A, 649 A).

Plaintiffs' exhibit 7 contains a memorandum, which describes the first two sheets as the Mitchell drawing plot plan and the Mitchell drawing showing present and proposed elevations. The large sheet is described as the Beamon Corporation drawing sheet number 3, approved by the Borough of Manhattan.

McLean got his instructions from a foreman named Harry, who was an employee of United Porcelain. He

was never told by Harry that it was bad practice to put weight on the overhang (530 A). On the other hand, when the United Porcelain workmen gave a demonstration for McLean as to how the job should be done, they did it the same way that it was done at the time the accident happened (508 A).

The Change In Theory

The final witness in the case was Mr. Spencer, an officer of Beamon. He testified that the lights in question should be installed from a scaffold in front of the overhang (650 A). He also identified the plans as being drawn by Beamon (648 A). The exhibit is erroneously referred to in the transcript as defendant's exhibit B, but a description of the documents make it clear what he is referring to and, in any event, defendant's exhibit B was not received in evidence until after Mr. Spencer left the stand (669 A). He also testified that the plans drawn by Beamon show the coping, but does not set forth whether or not there should be any attachments to the coping (663 A, 664 A). Judge Knapp was extremely impressed, as it later developed, with an unresponsive answer given by Mr. Spencer:

> "Q. Sir, when you spoke of a 30 pound live load, if a man is standing upright and weighs 180 pounds approximately, how much of a live load per square foot, would you have there? A. Depends on the area between the two brackets, certainly not—a man standing on the end—one bracket itself would perhaps hold two people standing on the end of it." (665 A)

The Court submitted to the jury a single issue as to Gulf's negligence and that is whether or not the plans were defective. This was excepted to and in subsequent

colloquy, the Court made a finding that there was no evidence that the coping was defective as claimed by the plaintiff (757 A, 758 A). Judge Knapp also held that the theory which was submitted was inconsistent with the pre-trial Order and the case as litigated (807 A).

Indemnity

The primary defendant, Gulf, had an indemnity agreement with Beamon, as follows:

> "13. In case of entry by the seller or any of seller's agents or employees upon the property or premises of the purchaser, for the purpose of construction, erection, inspection or delivery under the order, the seller agrees to provide all necessary and sufficient safeguards and take all proper precautions against the occurrence of accidents, injuries or damages to any persons or property, and to be responsible for and to indemnify and save harmless the purchaser from all loss or damages and any and all claims by reason of accidents, injuries, including death, or damages to any persons or property in connection with such work or from all fines penalties or loss incurred by reason of the violation of any law, regulation or ordinance, and further agrees to defend at the seller's expense, any and all suits or actions, civil or criminal arising out of such claims or matters and further agrees to procure and carry public liability and property damage insurance with contractual liability endorsement and such insurance of employees as may be required by any workmen's compensation act or other law, regulation or ordinance which may apply in the premises."

This contract was submitted to the jury by Judge Knapp in an excess of caution. The Court remarked that if Gulf did not prevail with the jury, a motion would lie for a judgment notwithstanding the verdict (669 A).

In addition, the dealer-tenant, Joseph James, Inc., had an agreement with Gulf, which reads, as follows:

> "7. Lessee agrees to exonerate, save harmless, protect and indemnify Lessor from any and all loss, damages, claims, suits or actions, judgments and costs which may arise or grow out of any injury or death of any person or persons or damage to any property caused by or in any manner connected with the use, possession, repair or condition of said premises or any equipment or fixtures thereon."

Mr. James testified, as follows:

> "Q. Yes, did you have any conversations with anybody from Gulf about having this porcelain job done on the gas station? A. No, it was supposed to have been done when I took the building.
>
> Q. And from time to time did you mention to the people from Gulf when are you going to come around to do this job? A. That is true.
>
> Q. Who did you talk to, Sir? A. I forget his name, but he is manager.
>
> Q. A Gulf manager? A. In the Bronx.
>
> Q. Did you talk to this gentleman on one occasion or more than one occasion? A. Well, it was promised to me when I took the building and he kept putting it off, so I told him that I was not going to continue my franchise if they didn't fix the building up. The building was in a run-down condition. (619 A, 620 A)."

POINT I

The indemnification of Gulf by Beamon was proper.

Counsel for Beamon finds himself in the unenviable position of talking out of both sides of his mouth. On the one hand, he urges that the Gulf-James Contract is unequivocal and on the other hand, he urges that the Gulf-Beamon Contract is ambiguous.

In fact, both are clear and unlimited. The one dealing with the occupant of the premises, James, uses the phrase, in any manner connected with the use possession or repair or condition of said premises.

In the first, the language is appropriate to that of a lessee. In the second instance, dealing with a contractor, the language is equally unlimited and equally appropriate to a contractor in which it refers to any of the seller's agents or employees and refers to any and all claims by reason of accident, injuries, including death or damages to any person or property in connection with such work. Certainly, this is the unequivocal and unambiguous language that should have required judgment in favor of Gulf against Beamon as a matter of law.

The Court wisely submitted this issue to the jury, so that in the event an Appellate Tribunal ruled that this was an issue of fact, a re-trial could be avoided. Judge Knapp did this while specifically stating on the record that judgment notwithstanding the verdict would be considered, if it became necessary.

Stripped of its excess verbage, the argument of Beamon is that this language is such that it would not justify judgment in favor of Gulf as a matter of law, and that furthermore, it did not reach the level of creating a jury issue as to interpretation.

One may look in vain in plaintiffs' brief for any authority by which the language at bar has been construed to be inadequate.

The only quotation is from a trial term case, *Donnelly* v. *Rochester Gas and Electric Corporation,* 44 M 2d 855. This refers to liability arising out of a dangerous condition existing prior to the making of the contract. This is clearly not the case at bar since such an issue was never submitted to the jury and was abandoned by the plaintiff when the case shifted on its axis after the testimony was in. The Appellant's reference to the elimination of "structural obstructions" is equally mystifying since the record is completely barren as to any evidence of any obstructions, let alone any that were causily related to the accident.

The question of indemnity for negligence has been a troublesome one under New York law. It appears, however, that New York Court of Appeals decided to cut its way out of the thicket in 1971 in the case of *Levine* v. *Shell Oil Company,* 28 NY 2d 205. The defendant, Shell, had notice of the condition in which a defective heater leaked natural gas. Shell made "neither inspections nor repairs" and an explosion resulted. Indemnity was sought under an agreement with the tenant-dealer. Shell was to be indemnified for injuries caused by or happening in connection with the premises (including the adjacent sidewalks and driveways) or the condition, maintenance, possession or use thereof or the operations thereon".

The Court reviewed the prior cases on the point and then held at page 211:

> "Such a rigid adherence to the doctrine of Thompson-Starrett is however neither required for reasons of policy nor by other decisions of this Court. We

> have found an expression of the requisite intent in several cases where no mention was made of active negligence."

Further, at page 212, the Court held:

> "Inasmuch, as Kurek and Liff have made substantial inroads on the Thompson-Starrett rationale, it is no longer a viable statement of the law. As was said in Kurek (18 NY 2d supra at page 456): "Courts should be wary construing these provisions in such a manner that they become absolutely meaningless".
>
> "Since the plain meaning of these words fairly includes the liability for the active negligence of Shell, we see no reason why more should be required to establish the unmistakable intent of the parties. A contrary construction would result in the conclusion that the clause was a nullity. Surely, this could not have been the intent of the parties (see *Corhill Corp.* v. *S. D. Plants, Inc.*, 9 NY 2d 595, 599; *Muzak Corp.* v. *Hotel Taft Corp.*, 1 NY 2d 42, 46)."

This is precisely the situation at bar inasmuch as Gulf and Beamon were both well aware that the installation would be subcontracted. The indemnification agreement would clearly be a nullity if it were not to include the work of installation.

The position of the New York Court of Appeals was reaffirmed in the case of *Margolin* v. *New York Life Insurance Company*, 32 NY 2d 149.

In the *Margolin* case, there were two concurrent causes of the accident, one of these causes was solely the responsibility of New York Life Insurance Company, which

sought indemnity. In interpreting the agreement, New York Life was awarded indemnity against its contractor.

Furthermore, it is implicit in Beamon's argument that under no circumstances, could a contract of indemnity for negligence be submitted to a jury. This is clearly not the law of New York. See the case of *Egan* v. *City of New York,* 3AD 2d 827.

POINT II

Gulf was entitled to indemnity from James.

Beamon's brief assumes that the Court dismissed the indemnity action against James on the basis of the General Obligations Law. That is, by no means, clear from the record. When the motion was at first argued, the Court evidenced a disposition to grant the motion on the basis that James had no connection with the work (614 A). Subsequently, James was called as a witness by Gulf and testified affirmatively that not only did he insist that the work be done, but he threatened to abandon his franchise if Gulf did not take care of it (628 A). At the end of all the evidence, the motion to dismiss by James was granted without further comment (667 A).

The case of *Levine* v. *Shell, supra* is on all fours with the case at bar. A reading of the language quoted in *Levine* compared to the language in this contract shows no distinction.

Subsequent to the *Levine* case, the Appellate Division, Second Department had occasion to consider the identical language in our case in *Redding* v. *Gulf,* 38 AD 2d 850. The Court held the language in *Redding* to be of the same effect as the language in *Levine.* A distinction was made however, since in *Redding* the plaintiff and the lessee

were one and the same. The Court pointed out that the phrase "injury to any person" was controlling and held:

> "We would be constrained to hold that the term 'any person' includes Redding were it not for the first paragraph of the lease which provides that the parties should be known as lessor and lessee in the remaining terms thereof."

The Court further held:

> "Under this statute, Gulf could not lawfully have inserted a clause in its contract with Redding, which provided that no cause of action would lie against it for injury to Redding himself."

Further, in referring to the *Levine* case, the Appellate Division held:

> "At most, Levine stands for the proposition that where a third party sues the landlord oil company for its active negligence, the tenant station operator may be required to respond under the indemnification clause."

POINT III

The submission of the case against United Porcelain to the jury was proper.

It is true that the jury exonerated McLean and Linfante personally from any negligence by their verdict. However, the work was being done in a fashion which the jury could have found was foolish and reckless. The plaintiffs' expert so described it (495 A) and Mr. Spencer, another qualified expert, testified that a scaffold should have been used.

McLean testified that he received instructions from his employer in the manner in which the work was to be done and this consisted primarily of demonstrations. He testified that the work was done in the same manner as the United Porcelain's foreman demonstrated for him.

Under the circumstances, there was clearly an issue for the jury to determine as to whether or not United Porcelain was negligent in other respects than the actual negligence of McLean and Linfante. This issue was properly submitted to the jury and the jury returned a verdict which both exonerated McLean and Linfante and held the United Porcelain liable. Under the circumstances, it should not have been disturbed.

POINT IV

Gulf was entitled to common-law indemnity.

At page 25 of the Appellant's brief, it is stated that Gulf's own employees admit that Gulf hired the architect and had the plans prepared for this job. On the contrary, it is stated by Mr. Beckett that Gulf did not hire an architect to prepare plans for the job (266 A). The references contained in Appellant's brief refer to a plot plan and a paving plan (267 A). It was Beamon's employee, Spencer, who testified that the plans were drawn by Beamon and that they were stamped with the architect's seal (648 A).

Even if we assume, however, that Beamon's reading of the record was in any way accurate, one vital element is missing. Under what authority would Gulf be liable for the malpractice of the architect? There is no proof that the registered architect, Mitchell, was an employee of Gulf and in fact, the evidence points to the fact that he was not.

Beamon's brief makes much of the question of inspection. The Gulf employees did not admit such responsibility. Mr. Wiese stated that he did not know of anybody who had the responsibility (241 A). In any event, as the case was submitted to the jury, the question of inspections was out the window, since there was no claim at that point that there were any defects to be discovered.

If the plaintiffs had any case at all it was based on the plans and the plans were drawn by Beamon. The surprising thing is that the jury let Beamon off so easily on the apportionment.

POINT V

A new trial of the indemnity issue is not required.

In view of the fact that the only issue which was submitted to the jury was that of defective plans, as has been discussed previously, the plans were drawn by Beamon, if Gulf was negligent at all, the common-law indemnity should have been almost automatic.

Under the circumstances, it can hardly be said that the charge as to supplying scaffolds or ladders was prejudicial.

In any event, if this Court finds that the handling of the ladder and scaffold issue was reversible error, then it is respectfully requested that the entire case be sent back for a retrial since the handling of this issue was equally prejudicial to Gulf.

CONCLUSION

The judgment appealed from should be affirmed in all respects or in the alternative, Gulf should be granted judgment against the defendant, James.

Respectfully submitted,

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375—Affidavit of Service United States Court of Appeals for the Second Circuit Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

James V. McLean, Ethel McClean, Joseph Linfante and Susan Linfante

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and

United Porcelain Co. Inc.,

Third Party Defendant-Appellee

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF New York, ss:

I, Raymond J. Braddick, agent for Furey & Mooney Esqs. being duly sworn, deposes and says that he is over the age of 21 years and resides at 8 Mill Lane Levittown, New York

That on the 16th. day of August 1974 at see attached list he served the annexed Brief of Third Party Plaintiff-Appellee upon see attached list in this action, by delivering to and leaving with said attorneys 3 true copys thereof.

DEPONENT FURTHER SAYS, that he knew the person so served as aforesaid to be the person mentioned and described in the said action

Deponent is not a party to the action.

Sworn to before me, this 16th. day of August 1974

Raymond J. Braddick

Roland W. Johnson

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4609705
Qualified in Delaware County
Commission Expires March 30, 1975

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